

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

TOM SMITH,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Respondent.

) Case No. DEMO-01-0001

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, LEANA D. LAMB, Member. The hearing was held at Lakeland Village Administration Building, Medical Lake, Washington, on October 18, 2001. GERALD L. MORGEN, Vice Chair, reviewed the file, recorded proceedings, and exhibits and participated in the decision in this matter. WALTER T. HUBBARD, Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Tom Smith was present and was represented by Chris Coker, Attorney at Law, of Parr & Younglove, P.L.L.C. Pat Thompson, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of demotion for neglect of duty, gross misconduct and willful violation of agency policy. Respondent alleged that Appellant

1 kissed a client on two occasions in an attempt to deescalate her maladaptive behavior; failed to
2 complete requisite documentation regarding the client's maladaptive behavior; was alone in a
3 locked bathroom with the client; and failed to notify nursing staff and document the client's
4 complaint of an injury.

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6 1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084
7 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Rainwater v.
8 School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services,
9 PAB No. D93-053 (1994).

10 11 **II. FINDINGS OF FACT**

12 2.1 Appellant Tom Smith is a Food Service Aide 1 and permanent employee for Respondent
13 Department of Social and Health Services. Appellant and Respondent are subject to Chapters 41.06
14 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a
15 timely appeal with the Personnel Appeals Board on January 8, 2001.
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18 2.2 By letter dated November 30, 2000, Al Kertes, Superintendent of Lakeland Village,
19 informed Appellant of his demotion from his position as an Adult Training Specialist 2 to a Food
20 Service Aide 1. Mr. Kertes alleged that Appellant neglected his duty, committed gross misconduct
21 and violated policy when he kissed client CW on two occasions in an attempt to deescalate her
22 maladaptive behavior; failed to complete a Behavior Recording Form for the incident; was alone in
23 a locked bathroom with CW for approximately five minutes; and failed to notify nursing or cottage
24 staff and document CW's complaint of medical ailments.
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1 2.3 Appellant began his employment as an Adult Training Specialist with the Department in
2 1986. Appellant is employed at Lakeland Village; a DSHS facility that serves and habilitates
3 developmentally disabled adult clients. The clients at the facility have an opportunity to learn work
4 skills. As an Adult Training Specialist (ATS) 2, Appellant was responsible for instructing and
5 training the clients. Appellant has no history of prior formal or informal disciplinary actions and his
6 performance evaluations indicate that he was rated as an above average employee who exceeded
7 normal requirements.

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9 2.4 The institution adopts Behavior Support Plans (BSP) for each of its clients. The BSP
10 addresses how to manage a client's maladaptive behavior (target behaviors). A client's BSP is
11 likened to a doctor's order and staff is not allowed to deviate from the instruction in the BSP. The
12 institution also requires that staff document when a client displays a target behavior, the frequency,
13 and the method of intervention employed on a Behavior Response Form (BRF). A client's BSP is
14 specific as to the type of information staff is required to record in a client's BRF. Staff
15 psychologists use the recorded information to determine how clients are responding to their
16 behavioral plans and whether to make changes in a client's plan.
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19 2.5 On August 23, 2000, Appellant and coworker Joanne Helm, Adult Training Specialist 2,
20 were working in the multipurpose room with clients. Client CW began to display inappropriate and
21 escalating behavior. CW's inappropriate behavior continued to escalate. In response to CW's
22 behavior, Appellant told CW, "I have something for you," and he leaned over and kissed her on the
23 cheek. CW's behavior deescalated for a brief time. However, several minutes later, she started
24 complaining and her behavior began to escalate. Appellant again leaned over to CW, told Ms.
25 Helm, "look at this," and kissed CW on the other cheek.
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1 2.6 CW's BSP identifies the strategies staff should implement whenever she displays
2 inappropriate target behavior. Staff is required to implement the least restrictive measure first,
3 beginning with verbal prompts and/or redirection, and if ineffective, then staff moves on to the next
4 step, such as placing the client in a neutral area. Appellant was familiar with CW's Behavior
5 Support Plan. It is never appropriate for staff to kiss a client in an attempt to redirect his/her
6 behavior.
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9 2.7 Later in the day, Appellant escorted CW into the bathroom to check her back in response to
10 CW's complaints of injury. While in the bathroom, Appellant washed his hands and then checked
11 CW's back for injury. Appellant noted no visible signs of injury and washed his hands again. Ms.
12 Helm was working with a client that needed access to the bathroom. Ms. Helm and the client
13 approached the bathroom and Ms. Helm knocked on the door. Ms. Helm is hearing impaired and
14 she did not get a response. Ms. Helm continued to knock on the door, however, Appellant, who
15 also suffers a significant hearing loss, did not hear Ms. Helm knocking on the bathroom door. Ms.
16 Helm reached for the doorknob and discovered the door was locked. Ms. Helm continued to wait
17 and after several minutes, the bathroom door opened and CW exited. Appellant was at the sink
18 rewashing his hands.
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21 2.8 Appellant denies that he locked the bathroom door, and we have no reason to disbelieve his
22 testimony since it was also plausible that CW could have locked the door.
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1 2.9 Prior to leaving work for the day, Ms. Helm, who believed Appellant and CW were in the
2 bathroom for “too long” reported the incident to a superior. The following day, Ms. Helm also
3 reported that Appellant kissed CW. A subsequent investigation ensued.
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5 2.10 Respondent has adopted Procedure 4.6 that establishes a process for notification and
6 documentation of a client illness or injury. The policy requires that staff notify the cottage nurse if
7 a client appears to be ill or injured. The policy further requires staff to document the events
8 surrounding the injury in the client’s unit record. Appellant did not subsequently notify nursing
9 staff or complete documentation of CW’s complaints of pain in her back.
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11 2.11 Respondent has no policy or practice that prohibits employees from being alone with or
12 assisting clients in the bathroom. Staff is required to close the bathroom door to protect a patient’s
13 right to privacy.
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16 2.12 Former Superintendent Alan Kertes was Appellant’s appointing authority. Mr. Kertes
17 reviewed the findings of the investigation and met with Appellant to discuss the charges. Mr.
18 Kertes subsequently concluded that Appellant engaged in misconduct when he kissed CW twice in
19 an attempt to modify her maladaptive behavior; when he failed to complete her BRF, and when he
20 went into a bathroom and was alone with her for 4 to 5 minutes and then failed to inform nursing
21 staff who was qualified to assess her for injury.
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24 2.13 Mr. Kertes was concerned that Appellant’s action undermined CW’s behavior modification
25 strategy because the action of kissing her reinforced the negative and inappropriate behavior she
26 was engaging in. Mr. Kertes was also concerned that Appellant did not understand why his actions

1 were wrong and how he interfered with the institution's mission to appropriately modify CW's
2 maladaptive behavior. Mr. Kertes also found that Appellant willfully violated Lakeland Village
3 policies when he failed to complete a BRF for CW and when he failed to report her complaints of
4 injury to nursing and/or cottage staff.

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6 2.14 Mr. Kertes believed that by demoting Appellant, he could continue to work in a support role
7 within the organization in a position where he did not have a direct role in client care. Mr. Kertes
8 demoted Appellant to a Food Service Worker position where he would not interact with clients.
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10 **III. ARGUMENTS OF THE PARTIES**

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12 3.1 Respondent argues that the evidence and testimony support that the misconduct occurred
13 and that the demotion was warranted. Respondent argues that Appellant neglected his duty and
14 violated the client's Behavioral Support Plan when he kissed her twice in an attempt to deescalate
15 her behavior. Respondent argues that kissing a client in an attempt to redirect her behavior was not
16 appropriate and was not authorized by the client's Behavioral Support Plan. Respondent contends
17 that Appellant again neglected his duty when he spent five minutes with her in the bathroom with
18 the door locked and when he failed to report the client's complaint of a backache. Respondent
19 argues that Appellant's actions undermined the agency's ability to change the client's maladaptive
20 behavior. Respondent also asserts that Appellant neglected his duty and violated policy when he
21 failed to report a potential injury to nursing or cottage staff. Respondent asserts that Appellant
22 received appropriate training, understood the client's plan, and that the demotion was appropriate
23 because it took Appellant out of client care.
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1 3.2 Appellant argues that he made a “split second” decision to give CW “a peck” on the cheek,
2 which he now realizes was poor judgment on his part. Appellant asserts that entering the bathroom
3 with a client to look at an injury is not prohibited by policy. Appellant asserts that after he checked
4 CW, he saw no injury, and therefore, he felt there was no need to report her complaint or to
5 document her complaint of injury. Appellant further argues that he had discretion to make a
6 judgment call as to whether or not to report the client’s complaints. Appellant asserts he was
7 forthright and consistent throughout the investigation, and he contends that he was removed from
8 client care based on implication of sexual misconduct that the agency could not prove and which
9 was based solely on Ms. Helms' allegations. Appellant contends that a 15-range demotion was too
10 severe in light of his actions.
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12 13 IV. CONCLUSIONS OF LAW

14 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
15 herein.
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17 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
18 the charges upon which the action was initiated by proving by a preponderance of the credible
19 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
20 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep’t of
21 Corrections, PAB No. D82-084 (1983).
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23 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
24 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep’t
25 of Social & Health Services, PAB No. D86-119 (1987).
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1 4.4 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to
2 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).
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5 4.5 Willful violation of published employing agency or institution or Personnel Resources
6 Board rules or regulations is established by facts showing the existence and publication of the rules
7 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
8 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).
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10 4.6 Respondent has proven that Appellant neglected his duty and violated CW's Behavior
11 Support Plan when he kissed CW on the cheek in an attempt to modify her maladaptive behavior.
12 Appellant's misconduct undermined the agency's mission to carry out rehabilitative services, was
13 not conducive to making positive changes in CW's behavior and constitutes gross misconduct.
14 Respondent has also proven that Appellant neglected his duty and violated policy when he failed to
15 make an entry onto CW's Behavior Recording Form. The agency requires that approved as well as
16 any deviation from the approved intervention be documented in the BRF. Respondent has failed to
17 prove that Appellant engaged in misconduct when he was alone with CW in a locked bathroom.
18 There are no policies which prohibit a staff member from being alone in a bathroom with a client,
19 and there was no credible evidence that Appellant locked the door. However, Appellant neglected
20 his duty and violated policy when he subsequently failed to report CW's complaints of injury to
21 nursing staff and when he failed to document those complaints in CW's client unit record.
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25 4.7 In determining whether a sanction imposed is appropriate, consideration must be given to
26 the facts and circumstances, including the seriousness and circumstances of the offenses. The

1 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to
2 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the
3 program. An action does not necessarily fail if one cause is not sustained unless the entire action
4 depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

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6 4.8 Under the facts and circumstances of this case, we conclude that demoting Appellant from a
7 position as Adult Training Specialist 2 to a Food Service Aide 1 was too severe. Appellant had no
8 prior corrective action (either formal or informal), and he was a long-term employee with an
9 excellent work history. Therefore, we conclude that a six-month, 10 percent reduction in pay is
10 sufficient to prevent recurrence, to deter others from similar misconduct and to maintain the
11 integrity of Respondent's program.
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V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Tom Smith is modified to a six-month, 10 percent reduction in pay.

DATED this _____ day of _____, 2001.

WASHINGTON STATE PERSONNEL APPEALS BOARD

Gerald L. Morgen, Vice Chair

Leana D. Lamb, Member